SERVED: December 15, 2005

NTSB Order No. EA-5195

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 12th day of December, 2005

MARION C. BLAKEY, Administrator, Federal Aviation Administration, Complainant, v. TERRY C. BASSETT, Respondent.	Docket SE-16965

OPINION AND ORDER

Respondent has appealed from the November 19, 2004 written initial decision and order of Administrative Law Judge William A. Pope, II in this matter, issued following an evidentiary hearing held on November 3, 2004.[1] The Administrator's order

[1] The law judge's initial decision (which was re-served on November 29, 2004, to correct a typographic error) is attached.

suspended respondent's airline transport pilot certificate for 30 days, based on alleged violations of 14 C.F.R. §§ 91.13(a)[2] and 91.119(d).[3] The law judge affirmed the alleged violation of § 91.13(a), rejected the Administrator's conclusion that respondent had violated § 91.119(d), and reduced the suspension from 30 days to 20 days. We deny respondent's appeal.

The Administrator's August 28, 2003 order, which served as the complaint before the law judge, alleged the following facts and circumstances:

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[2] Title 14 C.F.R. § 91.13(a) provides:

§ 91.13 Careless or reckless operation.
(a) *Aircraft operations for the purpose of air navigation.* No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

[3] The pertinent portions of 14 C.F.R. § 91.119 state:

§ 91.119 Minimum safe altitudes: General.

Except when necessary for takeoff or landing, no person may operate an aircraft below the following altitudes:

. . . . .

(d) *Helicopters*. Helicopters may be operated at less than the minimums prescribed in paragraph (b) [minimum safe altitude for congested areas] or (c) [minimum safe altitude for uncongested areas] of this section if the operation is conducted without hazard to persons or property on the surface. In addition, each person operating a helicopter shall comply with any routes or altitudes specifically prescribed for helicopters by the Administrator.

1. At all times material herein you were and are now the holder of Airline Transport Pilot Certificate No. 136607484.

2. On or about August 31, 2002, you operated as pilot in command a Sikorsky helicopter (N15460) on a repositioning flight in the vicinity of Miami Children's Hospital in Miami, Florida.

3. The flight path you took required the helicopter to fly between two buildings.

4. The clearance between the rotor blades and the walls of two above-mentioned buildings was approximately six feet.

5. During the course of the above-described flight, the blades of the above-described helicopter struck one of the buildings.

6. After the blades of the helicopter struck the above-mentioned building, the helicopter crashed on a road near the building.

7. During the above-mentioned flight you operated the helicopter at less than the minimum altitude of 1000 feet above the highest obstacle within a horizontal radius of 2,000 feet of the aircraft.

8. Your above-described operation of the helicopter during the above-mentioned flight caused a hazard to persons or property on the surface.

The parties stipulated that the takeoff path that respondent used was the only takeoff flight path available, because a vertical takeoff could not be safely performed from the site in the type of helicopter respondent was flying. Respondent testified that he had taken off from the site approximately 50 times before the aforementioned accident occurred. Transcript

(Tr.) 77. Respondent had received training from his employer, Air Methods, Inc., on taking off from the site. Tr. 76-77.

The law judge found that respondent violated § 91.13(a) because he operated the helicopter carelessly by becoming distracted by a torn, flapping awning over which it was necessary to fly as part of the departure path. The law judge found that respondent's reaction to the torn awning caused the helicopter to crash:

> I find that the cause of the helicopter's main rotor blades striking the corner of the parking garage, and the resultant crash landing, was the failure of the Respondent to maintain flight control of the helicopter, when he was startled by a flapping awning beneath it as he passed over an awning covered crosswalk. There is no evidence, however, that the flapping awning presented an actual hazard to his helicopter.

ALJ Decision at 5. In addition, the law judge found:

> It is evident that the only safe evasive action the Respondent could have taken when he saw the flapping awning was to continue to fly straight ahead and to try to climb faster, if possible. Instead, he diverted his attention to the flapping awning, and failed to watch where the helicopter was going. Through his inattention, a potential hazard posed by the flapping awning turned into a disaster when he failed to keep the helicopter on its straight ahead course, with the result that it swerved to the right, its main rotor blades impacted the parking garage, and it had to crash land on the street below.

Id. Accordingly, the law judge ordered a 20-day suspension of respondent's ATP certificate, based on respondent's violation of

§ 91.13(a).[4]

Respondent appeals the law judge's conclusion that he violated § 91.13(a) by operating the helicopter carelessly. Respondent asserts that the § 91.13(a) violation is a residual claim that was not charged, and cannot stand, independent of the § 91.119(d) violation.[5] Respondent argues that the Administrator never alleged an independent charge of carelessness, and that, once at trial, the Administrator sought to amend the charges to include such an independent allegation. Respondent argues that he did not have adequate notice of the charges against him.[6]

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[4] In dismissing the § 91.119(d) charge, the law judge held that the Administrator had not proven by a preponderance of the evidence, "that the Respondent violated [14 C.F.R. § 91.119(d)] by taking off from an inappropriate site." ALJ Decision at 6. In reaching this conclusion, the law judge deemed respondent's use of the takeoff site as consistent with the portion of the regulation that allows pilots to deviate from the minimum safe altitude standards "when necessary for takeoff or landing." 14 C.F.R. § 91.119. See Administrator v. Kittelson, NTSB Order No. EA-4068 at 2 (1994). The Administrator did not appeal from the dismissal of the § 91.119(d) charge.

[5] Often, a § 91.13(a) charge is alleged as a residual violation and is considered proven when the underlying operational violation has been proven. Administrator v. Seyb, NTSB Order No. EA-5024 at 2 (2003); Administrator v. Nix, NTSB Order No. EA-5000 at 3 (2002); Administrator v. Pierce, NTSB Order No. EA-4965 at 2 n.2 (2002); cf. Administrator v. Reynolds, 4 N.T.S.B. 240, 242 (1982) (stating that a carelessness violation can be found independent of another regulatory violation when circumstances are extremely egregious).

[6] In his appeal brief, respondent cites Administrator v. Lepping, NTSB Order No. EA-4874 (2000) (holding that it was prejudicial error for the law judge to base his decision on

Hence, respondent argues that the law judge impermissibly expanded the charges against him by finding carelessness independent of the alleged § 91.119(d) violation. Respondent also argues that the law judge's finding that he was careless was not supported by a preponderance of the evidence, because respondent was reacting to what he perceived as a legitimate threat.

In her response, the Administrator argues that respondent had notice that the § 91.13(a) charge was alleged as a potentially independent violation. The Administrator also argues that the Lindstam doctrine[7] applies to this case, such that the Administrator is not required to allege or prove specific acts of carelessness, but may instead create a

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grounds the Administrator did not assert), and Administrator v. Bell, 5 NTSB 289, 291 (1985) (having rejected the basis cited by the Administrator, the law judge should not have undertaken to determine whether the charges were sustainable on some other ground not alleged by the Administrator; doing so denied respondent adequate notice and opportunity to defend against such charges).

[7] Under Administrator v. Lindstam, 41 C.A.B. 841 (1964), the Administrator need not allege or prove specific acts of carelessness to support a violation of § 91.13(a). Instead, using circumstantial evidence, she may establish a *prima facie* case by creating a reasonable inference that the event would not have occurred *but for* respondent's carelessness. The burden then shifts to respondent to promulgate an alternative explanation for the event that casts reasonable doubt on, or overcomes the inference of, the Administrator's claim of carelessness. Id.; Administrator v. Stepovich, NTSB Order No. EA-4931 (2002).

reasonable inference that the event would not have occurred but for respondent's carelessness.

We agree that it would be improper for the law judge to expand the charges during the administrative hearing to include charges that were not present in the complaint.[8] Here, however, the issue of whether the carelessness charge was residual only or independent was addressed and settled long before the hearing. Respondent first argued that the § 91.13(a) violation was residual in his July 12, 2004 motion for summary judgment. In response to respondent's motion, the Administrator argued that the carelessness violation could be found either residually or as an independent violation under the Lindstam doctrine. In denying the motion on August 18, 2004, the law judge held that the carelessness charge could be considered either residual or independent, and that such an issue would depend upon how certain factual issues were resolved. See also Tr. 64. Therefore, the response and disposition of respondent's motion for summary judgment eliminated any doubt as to whether respondent should prepare to defend against an independent charge of carelessness. Accordingly, the law judge did not err by considering the § 91.13(a) charge as an independent

[8] A law judge may not independently determine whether the Administrator's charges are sustainable on some other ground that has not been alleged. See n.6, supra.

violation.[9]

Respondent's argument that he would have prepared his defense differently had he been aware that the § 91.13(a) charge was independent is not persuasive. Respondent only states that he would have introduced the deposition of Daniel Castro, an aviation safety inspector employed by the FAA, to support his argument that the carelessness charge was not independent of the § 91.119(d) charge. Respondent, however, does not articulate why Inspector Castro's deposition is helpful in his argument regarding the Administrator's notice of the § 91.13(a) charge. In his deposition, Inspector Castro merely stated that the carelessness charge arose out of the same set of facts that prompted the § 91.119(d) charge. In light of our finding that respondent had notice of the independent § 91.13(a) charge, we need not consider Inspector Castro's deposition.[10]

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[9] In addition, respondent's counsel questioned Keith Mackey, an expert witness, regarding whether Mr. Mackey believed respondent's operation of the helicopter was careless, therefore indicating that respondent was defending against the independent carelessness charge:

Q. From your review of the facts, as you understand them in this matter, was Mr. Bassett careless in any way?

Tr. 126.

[10] Furthermore, even if we did consider Inspector Castro's deposition, it would not have changed our decision regarding whether the § 91.13(a) charge was established, or whether respondent had notice of the independent § 91.13(a) charge, because Inspector Castro merely stated a fact on which all parties agree -- that both the § 91.119(d) charge and the

With regard to the law judge's carelessness determination, respondent has not fulfilled his burden under Lindstam to articulate an alternative explanation for the event that suffices to rebut the Administrator's claim of carelessness. As stated above, after considering all the evidence, the law judge found that there was no evidence that the flapping awning cover presented an actual hazard to the helicopter. Moreover, respondent testified, in response to the law judge's questions at the hearing, that he did not deliberately change the helicopter's course to avoid the flapping awning. Tr. 107; see also ALJ Decision at 5.

In establishing that respondent violated § 91.13(a) by a preponderance of the evidence, the Lindstam doctrine sets forth a burden-shifting analytical model.[11] Here, the Administrator has fulfilled her burden by providing a *prima facie* showing of carelessness: respondent admitted that the torn awning cover distracted him,[12] and that, while his attention was diverted, he

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carelessness charge arose out of the same facts.

[11] See n.7, supra.

[12] Respondent's September 1, 2002 written statement indicates that the torn awning cover momentarily took his attention from operation of the helicopter: "As we passed over the awning I noticed that a large section of the fabric cover was torn and flapping up due to the rotor downwash. This distracted me from negotiating the helicopter correctly through the passageway between the two structures." Exhibit A-10.

unintentionally allowed the helicopter to drift to the right, where its main rotor blades collided with the corner of a parking garage. Such facts suffice to establish that the event would not have occurred but for respondent's inattentiveness.

Respondent attempts to justify his momentary lapse of attention by arguing that the torn awning cover presented an immediate hazard to his helicopter. As we stated above, the law judge found that the flapping awning did not present an immediate hazard that would justify colliding with a building, and respondent has not shown any error in this finding. Overall, the law judge correctly concluded that respondent's failure to watch where his helicopter was going, although brief, endangered the lives and property of others, therefore resulting in a violation of § 91.13(a).

Because we find that nothing in respondent's appeal brief demonstrates reversible error in the law judge's resolution of all relevant issues, we deny respondent's appeal.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied and the law judge's initial decision is affirmed[13]; and

[13] The 20-day suspension of respondent's airline transport pilot certificate shall begin 30 days after the service date indicated on this opinion and order. For the purpose of this order, respondent must physically surrender his certificate to a representative of the Federal Aviation Administration pursuant

2. Respondent's motion for oral argument is denied.[14]

ROSENKER, Acting Chairman, and ENGLEMAN CONNERS and HERSMAN, Members of the Board, concurred in the above opinion and order.

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to 14 C.F.R. § 61.19(g).

[14] The issues have been fully briefed by the parties and oral argument is not necessary. See 49 C.F.R. § 821.48.